

REMARKS**OBJECTIONS**

Examiner noted that the Trademark VELCRO should be capitalized and accompanied by generic terminology hook and eye fastener. The applicant amended paragraph 014 as recommend.

Examiner noted that reference 35 was not described. Applicant provided a replacement drawing for FIG. 1.

112 REJECTIONS

Examiner noted that claims 1-13 and 18-21 were rejected as being indefinite under 35 USC Section 112.

Regarding claim 1 examiner noted that there was no antecedent basis for "the external surface", "the upper back area", "each opposing side", and "members". Applicant made appropriate amendments for clarification. Semi-circular shape support members is supported in paragraph 013.

Regarding claim 2 examiner noted that there was no antecedent basis for "the outer peripheral edge". Applicant made appropriate amendments for clarification.

Regarding claim 5 and 18 examiner noted that each claim needed a period. Applicant made appropriate amendments for clarification.

Regarding claim 7 examiner noted that "contains further comprises" and "pressure points" was unclear. Applicant made appropriate amendments for clarification. Applicant has added its definition of pressure points.

Regarding claim 11 examiner noted that "durable lightweight plastic" was not defined in the specifications. Applicant has added this to the specifications based upon the matter being defined in the claim 11.

Regarding claims 2, 3, 4, 5, 15, and 16 the preamble was amended from "device" to "apparatus" to be in line with independent claim 1.

102 REJECTIONS

Examiner noted that claims 1, 2, 7, 12-15, 22, and 23 were rejected under USC Section 102 by **Witkower**. The reference must describe every detail of the claimed invention. (See **Kalman v. Kimberly-Clark Corp.**, 713 F.2d 760, 772, 218 USPQ 781, 789 (Fed Cir. 1983)). Additionally, the reference must adequately describe the claimed invention to put it in the public domain (See **In re Zenitz**, 333 F.2d 924, 142 USPQ 158, 160 (C.C.P.A. 1964)). The description must enable a person with ordinary skill in the art not only to comprehend the invention but also make it. (See **Paperless Accounting, Inc v. Bay Area Rapid Transit Sys.**, 804 F.2d at 665, 231 USPQ at 653) The reference must teach the claimed invention. (See **Ex parte Fujishiro**, 199 USPQ 36 (Pat. Off Bd. App. 1977)).

Here, in claim 1 the applicant claims support members covering at least the lower section of each breast cup, and is made of a strong rigid material and semi-circular in shape. In claim 5, the back portion is continuous. The hook and eye to fasten the breast cups is along the inner peripheral edge of the mid-section which secures the entire breast support apparatus around the wearer's upper back area.

*Witkower discloses crescent shape support members attached to the inner surface areas of each breast cup as viewed FIG. 1 and 2. As viewed each support member is vertically attached along the internal peripheral edge of each mid-section. The back portion is not continuous. The cup members are attached by a hook and eye, but these fasteners does not secure the breast support apparatus in place as disclosed by the applicant. The type of material used for the support member is not disclosed. In **Witkower**, a hook and eye fastened to each end of the separated back portion securely fastens the breast support apparatus in place.*

Thus, Witkower does not disclose each and every claim limitation as claimed by the applicant and does not anticipate the claimed invention.

103 REJECTIONS

Examiner noted that claims 3-6, 16, 17 were rejected under USC section 103 by **Witkower** in view of **Chen**.

The mere fact that references can be combined or modified does not render the resultant combination obvious unless the prior art also suggest the desirability of the combination (*See In re Mills*, 916 F.2d 680 (Fed. Cir. 1990))

Obviousness cannot be established by combining the teachings of the prior art to produce the claimed invention, absent some teaching suggestion or incentive supporting the combination (*See In re Geiger*, 815 F.2d 686, 2 USPQ 2d 1276, 1278 (Fed. Cir. 1987)).

There must be some reason given the prior art why one of ordinary skill in the art would have been prompted to combine the teachings of the references to arrive at the claimed invention. (*See In re Regel* 188 USPQ

References that teach away cannot serve to create a prima facie case of obviousness. (*See In re Gurlsey*, 27 F.3d 551, 553, 31 USPQ2d 1130 (Fed. Cir. 1994)) In If references taken in combination would produce a "seemingly inoperative device", we have held that such references teach away from the combination and thus cannot serve as predicates for a prima facie case of obviousness. (*See In re Spinnoble*, 405 F.2d 578, 587, 160 USPQ 237, 244)

Obvious to try standard is an improper standard (*See In re Lindell*, 385 F.2d 453, 155 USPQ 521 (C.C.P.A. 1967)) It is impermissible to use the claimed invention as an instruction manual or template to piece together the teachings of the prior art so that the claimed invention is rendered obvious. An obvious rejection cannot be based upon hindsight and the specific teaching must come from the prior art. (*See In re Fritch*, 972

F.2d 1260, 23 USPQ 2d 178, 1784 (Fed. Cir. 1992). The claimed invention must be considered as a whole.

Here,

Examiner's may not use as an element of the obvious rejection that one skill in the art would arrive at the invention trying different alternative structures or materials (See *In re Lindell*, 385 F.2d 453, 155 USPQ 521 (C.C.P.A. 1967) that which is within the capability of one skilled in the art is not synonymous with obvious. Levengood teaches that an obvious rejection cannot be predicated on the fact that one skilled in the art would have the capability to arrive at the invention. Thus, that one can reconstruct and/or explain the theoretical mechanism of an invention by means of logic and sound reasoning does not afford the basis for an obvious conclusion (See *Id.*, 123USPQ at 352).

Here, in claim 1 the applicant claims support members covering at least the lower section of each breast cup, and is made of a strong rigid material and semi-circular in shape. A hook and eye fastens the breast cups along the inner peripheral edge of the mid-section securing the breast support apparatus in place. In claim 5, the back portion is continuous.

Witkower discloses crescent shape support members attached to the inner surface areas of each breast cup as viewed FIG. 1 and 2. As viewed each support member is vertically attached along the internal peripheral edge of each mid-section of each breast cup. The cup members are attached by a hook and eye, but these fasteners does not secure the breast support apparatus in place. In Witkower, a hook and eye fastened to each end of the separated back portion securely fastens the breast support apparatus in place.

Here, additionally, the applicant claims in several claims including claim 8 foam or memory foam that molds to the shape of the body. See exhibit 1. Applicant amended application to define memory foam. Chen discloses only flexible foam which means a

foam (i.e. rubber or plastic material filled with many small bubbles of air to make it soft and light) material that bends in any direction.

Witkower in view of Chen disclose a different structure than what is claimed by the applicant. Thus, Witkower in view of Chen does not suggest or teach the applicant claimed structure.

Applicant respectfully requests that the rejections be withdrawn. Alternately should the Examiner feel that a personal discussion might be helpful in advancing this case to allowance, he/she is invited to telephone the undersigned.

Respectfully submitted:



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CERTIFICATE OF TRANSMISSION

**I, Delphine James, hereby certify that the foregoing Response to the Office
Action is being transmitted to the Commissioner of Patents on August 8, 2004.
Facsimile phone number is 571-273-8300.**

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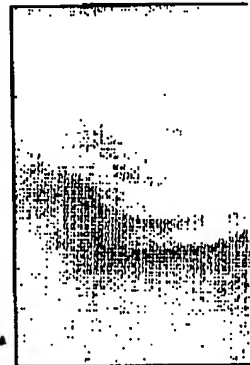
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